THE LIMITATIONS UPON THE TREATY-MAKING POWER.

The recent pleasing and well-written work upon the Limitations on the Treaty-Making Power of the United States, by Mr. Henry St. George Tucker, a criticism upon which appeared in the June, 1915, number of the VIRGINIA LAW REGISTER, presents questions of both a timely and far-reaching nature. The criticism in the LAW REGISTER points out the contentions made in Mr. Tucker's work without indicating the critic's approbation or disapprobation of them or any of them, and is therefore more in the nature of a review than a criticism. It has seemed, however, to the present writer that some of the views entertained by Mr. Tucker in the work mentioned go beyond the bounds of a true construction of the Limitations upon the Treaty-Making Power, and it is the object of this article to show wherein, as it appears to us, this departure has been made.

That there are many and powerful limitations upon the treaty-making power, there can be no question. These limitations are, however, all implied. Nowhere in the Constitution of the United States can there be found an express limitation upon this power. These limitations are implied too from the nature of treaties and of governments in general and of our own constitutional Government in particular. There are some limitations upon the treaty-making power as immediately indicated which apply to all governments. These are not, however, discussed as such by Mr. Tucker—it apparently being his object to consider only those limitations which apply distinctively to the government of the United States. Nor need these general limitations, except perhaps for clearness of conception, be separately considered, for the implied limitations under our own Government include all these general limitations upon this power and other limitations besides.

What, then, are these limitations and how are they implied?

The answer is, the limitations must be implied, if implied at all (except as to the inherent limitations above-mentioned), from a comprehensive and sound construction of the Constitution of the United States as a whole.

Mr. Tucker, after a careful survey of the entire subject, enu-

merates these limitations in the concluding chapter of his books as follows:

1. "I. That a treaty cannot take away or impair the fundamental rights and liberties of the people secured to them in the Constitution itself, or in any Amendment thereof."
2. "II. That a treaty cannot bind the United States by any agreement to do what is expressly or impliedly forbidden in the Constitution."
3. "III. That a power granted in the Constitution to be exercised by a certain department of the government and in a certain way, cannot be validly exercised by a treaty in disregard of the manner prescribed in the Constitution."
4. "IV. That a treaty cannot change the form of the government of the United States."
5. "VI. That the treaty power cannot confer greater rights upon foreigners than are accorded citizens of the United States under the Constitution."

All these limitations, for reasons sufficiently stated in Mr. Tucker's work, are, in the main, demonstrably sound. But there is another limitation claimed by Mr. Tucker, which, as it appears to the writer, has no substantial support in reason, and is inconsistent with a true view of the Constitution of the United States. It is enumerated as No. "V" in his list and is as follows:

> "'Personal and property rights of every kind and description may be the subject of treaties. Whenever the control or protection of such rights is, under the Constitution, confided to any department of the government or to a state, such department or state as the constitutional repository of such rights, cannot be ousted of their jurisdiction by having the same transferred to the treaty-making power.' Rights confided to certain departments of the government have been considered under III, sec. 373 (above-mentioned as No. 3) *so that this division relates to the police power and the reserved rights of the states.*" (*Italics ours.*)

The commentator in the Law Register, Mr. Jos. R. Long, states that this is "the main point at issue," and "to this question Mr. Tucker especially addresses himself;" but the commentator, without however, taking a decided stand, rather indicates his dissatisfaction with Mr. Tucker's interpretation of the case of Ware *v.* Hylton, 3 Dallas 199, which case is plainly in line with our present contention.

It is essential to get a proper understanding of terms at the outset of any discussion. It should therefore be noted that the term "police power" is somewhat ambiguous. The use of this term in two senses has been the cause of considerable confusion and probably erroneous decisions in the adjudicated cases, and indeed we note that Mr. Tucker has himself fallen into this error in certain portions of his work. There is a "police power" which inheres in every sovereignty which cannot by any deed, gift, grant, compact, contract, dedication, or even legislation, be conveyed away. This doctrine is so well recognized that the principle has been embodied in the form of the maxim: *Salus populi suprema lex.* This limitation inheres in the treaty-making power, not because that power is subordinate to the reserved rights of the states, but because it is a limitation of all governmental powers; and is one of those general limitations applying to all governments as mentioned in the first part of this article. Every treaty must be construed in the light of this principle and the treaty cannot be held to convey away this right, because governments, or any exercise of the governmental powers cannot be allowed to pervert the purposes for which governments exist. The question as to what is a matter involving the "safety of the people" is more or less indefinable, but it must appear that there is a public necessity for the exercise of such a law where it would otherwise come into conflict with a treaty.

It is, however, clear from the whole scope and purport of Mr. Tucker's contention that he uses the term "police power" as synonymous with the "reserved powers" of the states; which includes legislation, not only on such matters as are of an "overwhelming public necessity," but all legislation whatsoever within the limits of the Constitution of the United States—"those police powers which," says Chief Justice Taney, in the License cases, 46 U. S. 504, "are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions;" the "police power" in the comprehensive sense; the "police power" which embraces the whole system of internal regulation of a state.

Mr. Tucker contends that a statute passed by a state under its legitimate reserved or police powers, as thus defined, supersedes a treaty on the same subject made under the authority of the

United States government. The complete answer to this contention, however, is that (with the understanding that all treaties are made subject to the inherent right of self-protection mentioned above) *there are no powers reserved to the states with respect to treaties.*

The distinction between laws and treaties should be borne in mind. Treaties are compacts between sovereign states; Laws are rules of civil conduct prescribed by a sovereign state operating exclusively upon the inhabitants of its domains; it takes two or more powers to make a treaty; only one to make a law.

And it should be especially noted that the treaty-making power has to do with our foreign relations and our internal relations with foreigners. Solely as regards the latter relationship does it come into conflict with the law-making power, and then only incidentally.

Our government is unique in one respect: with respect to the *law-making power,* the sovereignty under the Constitution is divided between the state governments and the United States government, each supreme within its sphere. In order to maintain this status inviolate, it was necessary to clearly delineate the limits of each power so that it might be determined with precision where the sovereignty of the one ended and the other began. To accomplish this *desideratum,* the framers of the Constitution adopted the simplest method: they enumerated the powers given to the United States, and provided that the powers not granted to the United States, or prohibited to the states should be reserved to the states respectively.

This distribution of sovereignty is true, however, only of the law-making power. The object sought to be attained was to promote the common defense and general welfare of all the states by a consolidation of power, and at the same time to preserve to each state the right of local self-government for matters of its purely internal concern.

With respect to the *treaty-making power* the case was different. It was clear that treaties affected the external and internal relations of all the states more than the internal relations of any one state; and, therefore, was a subject all the states were interested in, and not a matter for purely local concern. Said Mr. Madison, in the Virginia Convention: "The object of treaties

is the regulation of intercourse with foreign nations and is external. I do not think it possible to enumerate all the cases in which such external relations would be necessary. * * * It is most safe therefore to leave it to be exercised as contingencies may arise." Hence the entire treaty-making power was given to the United States and a prohibition placed upon the states. The words of the Constitution are that "the President shall have power by and with the advice and consent of the Senate to make treaties, provided two-thirds of the senators present concur," and that "no state shall enter into any treaty, alliance or confederation." In another provision, treaties made under the authority of the United States are declared to be the supreme law of the land, "anything in the constitution or laws of any state to the contrary notwithstanding."

These provisions most undoubtedly establish the supremacy of treaties over the "laws of any state" conflicting therewith and passed under the reserved powers. The fact of such supremacy is not merely implied, it is actually expressed, for if a state undertook to pass an unconstitutional enactment outside of its reserved powers, it would be *ultra vires,* inoperative, "just as if it had never been passed," and therefore not a *law.* So the word "law" evidently includes what comes within the reserved powers of a state.

That there are no powers of the state reserved over treaties is also shown by the Tenth Amendment, which defines what are the reserved powers as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The treaty-making power, as we have seen, is not only delegated to the United States by the Constitution but also prohibited by it to the states. Hence, the existence of such reserved powers with respect to treaties is both implicitly and explicitly denied.

The limits necessary to be placed on this article fail us for a full review of the authorities. Judge Cooley says in his Principles of Constitutional Law, p. 32:

> "A state law must yield to the supreme law, whether expressed in the Constitution of the United States or in any

> of its laws or treaties so far as they come in collision, and whether it be a law in existence when the 'supreme law' was adopted or enacted afterwards."

And he cites the cases of Ware *v.* Hylton, 3 Dall. 199; Hauenstein *v.* Lynham, 100 U. S. 483; Parrott's Chinese case, 6 Sawy. 349; with the following comment: "In these cases a treaty was held of superior authority to an existing state statute, to a subsequent state statute, and to a subsequent state constitution, respectively."

It is not, however, our purpose, as we have said, to enter into a critical discussion of the cases, such as that of Ware *v.* Hylton, which is elaborately considered in Mr. Tucker's book.

Mr. Tucker contends that a majority of the judges held that the law of Virginia involved in that case was invalid on other grounds than its conflict with the Constitution; that it was necessary under the pleadings to decide this question first; and therefore, no question of conflict with the state law necessarily arose. This may be true, and yet the value of the case as an authority is not materially impaired. For the majority of the judges went on further and decided that the treaty in any event superseded the state law.

Mr. Tucker makes the point that Judge Marshall, who was of counsel for the Virginia debtors in the case, did not discuss the question "upon which it is now claimed the case was decided," but rested the case upon a ground that "in no wise involved a conflict between the treaty and the law of Virginia." Probably the real reason for this was hat Chief Justice Marshall recognized the obvious supremacy of the treaty over the law and sought to avoid the conflict. This position is rendered even more probable when we consider that in Judge Chase's opinion, which, as Mr. Tucker admits, was "clearly the ablest and most logical of those delivered in the case,"—the supremacy of the treaty over the law was the vital question in the case. Certainly under such circumstances if there had been any validity in the opposite view, Chief Justice Marshall would have made it in full justice to his client. The fact that he made no such contention clearly indicates that in his opinion the contention was obviously without merit. That such were his views

is unequivocally shown in Gibbons *v.* Ogden, 9 Wheat. 1, where he says:

> "The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the *same supremacy* on laws and *treaties* is to *such acts of the state legislatures as do not transcend their powers,* but, *though enacted in the execution of acknowledged state powers,* interfere with or are contrary to the laws of Congress made in pursuance of the Constitution *or some treaty made under the authority of the United States.*
>
> In every such case the act of Congress *or the treaty is supreme;* and the law of the state *though enacted in the exercise of powers not controverted* must yield to it." (*Italics ours.*)

As regards the case of Hauenstein *v.* Lynham, Mr. Tucker contends that the decision "turned upon the construction of the treaty," and the treaty gave the alien in that case "such time for sale of the real estate as the *law of the state might prescribe.*"

The Virginia court held that as Virginia had passed no law indicating the time in which such lands could be sold the lands could not be sold by the aliens *at all,* and were escheated to the Commonwealth, while Justice Swayne held, for the Supreme Court, in his opinion, "the terms of the limitation (in the treaty) imply clearly that some time, and not that none, was to be allowed." "There was therefore," Mr. Tucker adds, "no conflict between a treaty and a law of a state." The conflict, however, as it appears to us, is unmistakable. Under the law of the state no time was allowed, and the claim of the aliens failed; under the law of the treaty some time must be allowed, and the claim of the aliens succeeded. Which law should prevail? The Supreme Court of the United States, reversing the Virginia Court, upheld the treaty. It will be observed that Justice Swayne nowhere takes a view of the *Virginia law* contrary to that of Judge Moncure. The fact that an appeal to the Supreme Court of the United States has been allowed in these cases ever since the Judiciary Act of 1789 indicates that Congress has all along regarded treaties as paramount to state laws;

and we do not believe that Congress would have the power to grant appellate jurisdiction to the Federal Courts in such cases unless under the Constitution treaties are superior to state laws, as otherwise "the discretion of the Supreme Court and not the Constitution" would be made the measure of the Constitutional powers.

John C. Calhoun also lends the weight of his great support to the view we entertain, and we fully agree with Mr. Tucker's estimate of Mr. Calhoun: that he "stands *primus inter pares* among those who have been called upon to construe the Constitution of the United States." In a speech in Congress, quoted in Mr. Tucker's work at p. 218, he says:

> "The *enumeration of legislative powers in the Constitution* has relation then, *not to the treaty-making powers,* but to the powers of the state. In our relation to the rest of the world the case is reversed. *Here the states disappear.* Divided within we present the exterior of undivided sovereignty."

The fact that these expressions were used by the renowned protagonist of state rights render them even the more convincing.

There are many other reasons which might be given in support of the supremacy of treaties over state laws. Thus, if the contrary theory were true, a single state might easily involve the whole nation into war. Again, if treaties are subject to nullification by state laws, treaties with foreign nations in any way touching our internal relations with foreigners, had not only might as well not be made, but they would be a mockery and a delusion and a snare to the friendly foreign powers with which we might be dealing; and valuable concessions which our country might otherwise obtain would thus be lost. The patriot statesmen who framed the Constitution foresaw all these things, and, with the wisdom characteristic of their building, placed this power where it was most desirable to be placed. In the light of what ought to be, they made what is.

The two-thirds majority in the Senate requisite for a treaty was doubtless adopted as a sufficient check upon this power in the interests of the state laws. For it will be observed that this two-thirds majority in the Senate operates more favorably

to the states than a majority of both Houses of Congress which is necessary for the passage of legislation, because each state has an equal representation in the Senate, irrespective of its size or population.

It is hardly necessary to add that no claim is made herein that a treaty can cede away a state or any part thereof. This is universally admitted. The real reason for such a limitation upon the Government is, we conceive, the fact that the Constitution is a compact between the sovereign states. But even those who adopt the Hamiltonian theory must admit "that the Constitution in all its provisions looks to an indestructible union of *indissoluble states*."

In conclusion, however, our gratitude should be expressed to Mr. Tucker for pointing out the numerous limitations upon the treaty-making power other than the one herein discussed. In a day when there is so great a tendency towards over-nationalization, his work will serve us in good stead. It will enable us to keep our true bearings and not lose sight of the friendly stars.

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